IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL NO. 578 of 2001

in

SPECIAL CIVIL APPLICATION NO. 3781 of 2001

with

LETTERS PATENT APPEAL NO 579 of 2001

in

SPECIAL CIVIL APPLICATION NO. 3782 OF 2001

with

CIVIL APPLICATIONS NOS. 6886 AND 6887 OF 2001

in

LETTERS PATENT APPEALS NOS. 578 AND 579 OF 2001

W I T H

SPECIAL CIVIL APPLICATIONS NOS. 4956 AND 4957 OF 2001

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE K.R.VYAS

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRAKASH PULVERISING MILLS

Versus

STATE OF GUJARAT

Appearance:

1. LETTERS PATENT APPEALS NOS. 578 AND 579 OF 2001

MR SI NANAVATI SR. COUNSEL FOR NANAVATI & NANAVATI for Appellants
MRS MANISHA LAVKUMAR AGP for Respondent No. 1-3
MR MIHIR H JOSHI for Respondent No. 4

2. SPECIAL CIVIL APPLICATIONS NOS. 4956 AND 4957 OF 2001

MR MIHIR H JOSHI for petitioners
MR SI NANAVATI SR. COUNSEL FOR NANAVATI & NANAVATI for Respondent No.2.

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE K.R.VYAS

Date of decision: /08/2001

C.A.V. JUDGEMENT

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

#. The appellant Companies Prakash Pulverising Mills and Pestochem India Limited are aggrieved by the award of contract by respondents nos. 1 to 3 i.e. State of Gujarat in the Ministry of Health and Family Welfare Department, Director of Central Medical Stores Organisation and the Chairman of Secretarial Purchase Committee to the respondent no. 4 Company, i.e. M/s. HPM Industries Limited of 70% of the required quantity of 950 M.T. of Malathion 25% WDP with ISI mark. The two appellant Companies have been each awarded 15% of the quantity of the above product to be purchased by the respondents nos. 1 to 3 pursuant to the invitation for

tender under the terms and conditions contained in the Tender at Annexure A.

#. The learned Single Judge by his common judgment dated 2-7-2001 refused to interfere in the award of contract to the extent of 70% of the required quantity in favour of respondent no. 4 and 15% each in favour of the appellants. The two Special Civil Applications Nos. 3781 and 3782 of 2001 have both been dismissed giving rise to these two Letters Patent Appeals Nos. 578 and 579 of 2001.

#. After filing the present two Letters Patent Appeals, respondent no.4 filed two Special Civil Applications Nos. 4956 and 4957 of 2001 against each of the appellants challenging the award of contract to the extent of 15% to each of the appellants. The learned Single Judge, in view of the filing of the Letters Patent Appeals against his own judgment, referred the two Special Civil Applications Nos. 4956 and 4957 of 2001 filed by respondent no. 4, for decision along with the Letters Patent Appeals, as the subject matter involved in all the cases is common.

#. Few relevant facts and dates are required to be stated for deciding the controversy between the parties:

Respondent no.2, the Director, Central Medical Stores Organisation floated a Tender in the first week of April 2000 for purchase of the product described as Malathion 25% WDP with ISI mark. The above chemical/insecticide is required for spray in the Malaria Eradication Programme. The quote product is reserved for purchase only by the Government Authorities under the National Anti-Malarial Programme of the Central Government, which has been taken up in association with the World Health Organisation (W.H.O.). The quote product is not available for sale in the open market. The last date for filing the Tender was 27-4-2001 upto 2.00 p.m. The date for opening of Technical Bid of the Tender was fixed as 27-4-2001. The Commercial Bid was thereafter to be opened on a date to be communicated to the parties, who were found to be technically qualified. The two appellants and the respondent no.4 did not possess the minimum prescribed three years manufacturing and marketing experience of the quote product, which was one of the essential conditions of submission and acceptance of the Tender, under special conditions contained in the Tender document. Respondent no.4 was, thus, not qualified to file the Tender. One of the appellant Companies, Prakash Pulverising Mills, came to

know that despite disqualification of respondent no.4, it was being considered for award of contract. Prakash Purlversing Mills sent a letter on 14-5-2001, on which date, actually the Commercial Bid was opened by the Purchase Committee, respondent no.3. In that letter, the appellant no.1 Prakash Purlversing Mills informed the Director of Central Medical Stores Organisation, respondent no.2, that the respondent no.4 company has no manufacturing experience of minimum three years, as prescribed in the Tender conditions of the quote product Malathion 25% WDP with ISI mark. It was also informed that manufacturing data supplied by respondent no.4 to the Director, Bureau of Indian Standards, Jaipur Branch Office shows that between 7-1-1998 and 6-1-199, respondent no.4 had shown industrial production of the quote product with ISI mark and the fact can be verified by the Director, Bureau of Indian Standards, Jaipur. Similarly, by the said letter dated 14-5-2000, the appellant no.1 Company has informed respondent no.2 herein that respondent no.4 also lacks the requisite experience, as the information given by them in their affidavit, of first sale of 280 kg of quote product is false, as the product is reserved for purchase by the Government alone under the National Anti-malarial Programme and no product could be sold in open market. It was also pointed out that the ISI mark was renewed on 9-2-1999 and before that they could not have sold any product. Both the manufacturing and marketing experience claimed by them is unreliable and therefore its Technical Bid could not have been cleared allowing it's (respondent no.4) participation in the Commercial Bid. A copy of the said letter of the appellant no.1 dated 14-5-2001 addressed to the respondent No.2 is annexed to the Special Civil Application No. 3781 of 2001 at Annexure B. In reply to the above letter, the appellant no.1 was informed by respondent no.2, by his communication dated 23-5-2001 (Annexure C - SCA 3781/01), that the production of enclosure sent by the appellant no.1 with its letter, is an unlawful act on their part and they should explain personally under what circumstances they could obtain those documents. A criminal action through the police was also threatened against them.

#. Despite the protest of the appellant Companies that the respondent no.4 does not possess the requisite manufacturing and marketing experience of three years in the quote product with ISI mark, the Purchase Committee took a decision in its proceedings dated 22-5-2001 to award 70% of the required total quantity of 950 M.T. to the respondent no.4 @ Rs. 36,453/- per M.T. plus 1.14% Central Sales Tax equal to Rs. 36,872.21ps per M.T. It

may be mentioned at this stage that the lowest tender for the quote product exclusive of Sales Tax was of the appellant Companies i.e. Rs. 36152.89ps plus 4% Sales Tax. So far as respondent no.4 - HPM Industries Ltd. is concerned, the price quoted for the basic product was Rs. 36,459 per M.T. which was higher than the basic price quoted by the appellant Companies. But, the Sales Tax payable by respondent no.4 was only 1.15%, as it had the advantage of tax concession, being an industry in Sales Tax Concession Zone. Inclusive of tax, the price quoted by respondent no. 4 was Rs. 36,872.21ps per M.T., which worked out the lowest. Whereas, the price quoted by the appellant Companies with 4% Sales Tax was Rs. 37,599/per M.T. It is on this quoted price, the Purchase Committee awarded 70% of the required quantity of quote product to respondent no.4 at the rate quoted by it, and on the willingness of the appellants, at the same rate, it awarded 30% (15% each) of remaining quantity to the two appellants herein.

#. The learned Single Judge, in the impugned judgment and order, has in detail stated the case of the contending parties, but, in the conclusion, not dealt with the various contentions and objections raised by the contending parties before us, against each other. We shall take up the objections serially, as they are urged.

REQUIREMENT OF MANUFACTURING AND MARKETING EXPERIENCE

#. The first page of the Tender Form, which contains the heading regarding the description of the product, is required to be reproduced, as some controversy is raised on the meaning and import of it. It is quoted as under:-

"GOVERNMENT OF GUJARAT
CENTRAL MEDICAL STORES ORGANISATION
`Aushadh Bhandar Bhavan'
Nr. Stamp and Registration Building,
`KII'Road, Sector No.13/C, Gandhinagar.
:TENDER FORM:

IMPORTANT INSTRUCTIONS/TERMS/CONDITIONS TO TENDERERS
FORMING PART & PARCEL OF ENQUIRY DOCUMENT:
&

TENDER ENQUIRY # CMSO/D-305/QTY.CONTRACT/
2001-02 MALATHION 25% W.D.P. WITH ISI MARK
.....

ITEM : MALATHION 25% W.D.P.
LAST DATE OF ISSUE OF

TENDER : 26-04-2001 upto 4-00 PM
LAST DATE OF SUBMISSION
OF TENDER : 27-04-2001 upto 2-00 PM
DATE OF OPENING OF
TENDER
TECHNICAL BID : 27-04-2001 at 3-00 PM
TENDER FEE : RS. 5000/- (NON-REFUNDABLE)
SERIAL # OF P.T.F. : _____
NAME AND ADDRESS OF
TENDER : _____

_____

TENDER DOCUMENT COMPRISES OF FIVE PARTS LABELLED AS PARTS I/II/III/IV & SCHEDULE. THIS TENDER ENQUIRY IS FOR FIXATION OF QTY. EXTRACTS OF 01 ITEM.

(Signature & Stamp of Tender) (Contd.)"

The relevant part of special conditions 7 and 8 of the Tender contained in the Tender document on manufacturing and marketing experience read as under:-

"7.Manufacturing Date & Proof of manufacturing Experience:-

All manufacturers of quoted items must have minimum experience of 3 years for manufacture & marketing of the quote product on the date of opening of tender. For example, is cited below:-

(i) Very first Batch if the tender opens on 01-01-2001 the three years manufacturing experience is established only if the first batch of quoted product is manufactured on 01-01-1998 or earlier to that date. The date of manufacture of first batch & its quantity must be clearly shown in the second column of affidavit which must be strictly in accordance with the preformed shown in Part II-6 and

(ii) Year wise experience after first batch the quoted product must also have been subsequently manufactured atleast for 3 years in the above example. Discontinuance of manufacture after a single batch or no manufacture for less than 3 years will be considered as insufficient experience & the product will be disqualified. The manufacturer must therefore submit manufacturing data separately & year wise for at least preceding three years with distinct quantity & value strictly in the said

format.

(iii) Director reserves the right to disqualify any offer if the total manufactured quantity, shown in the affidavit is apparently insufficient in relation to the approximate purchases of last R.C. and

(iv) The year wise quantity marketed & its value must also be shown strictly as per the format in the affidavit.

8. The documents specified in general condition No.13 of Part I must strictly be as per the format wherever the format is prescribed in tender form or as prescribed by concerned authority viz. FDCA, ISI, Sales Tax, Income Tax etc. and must be valid on the date of opening of tender. The documents of drugs license, C.S.P.O. registration, higher price/lower price certificate, non-conviction certificate, Sales Tax Clearance Certificate & income Tax clearance certificate of both manufacturer as well as distributor must be submitted in case where the tender is submitted by --

of application for renewal or challan thereof for above certificates will not be considered in lieu of valid certificate except in case of renewal of Drugs License. The income tax clearance certificate & the non-conviction certificate may be allowed to be produced even at the stage of acceptance letter/agreement and in such case, such Certificate must be valid on the date of agreement."

#. On behalf of the appellants, learned counsel Shri Sudhir Nanavati referred to the data of manufacturing and marketing experience furnished by respondent no.4 in tabular form as under:-

---

"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of Very first Yearwise Continuance of production &
"Sr.No. Name of --

"Sr.No. Name of item batch of period marketing of year wise product

Date Qty	Mfd. Qty.	Sold Qty.	Sale Value (Rs.)approx
D-305 Malathion 25% WDP	8-8-97 500 Kg.	8-8-97 500 Kg.	N.A. N.A.
98-99 Kg.	280 Kg.	280	7,690
99-00 M.T.	1380 M.T.	1374	5,66,46,812
00-01 M.T.	1070 M.T.	1070	4,29,37,203

From the Chart containing the data of manufacture and marketing experience of respondent no.4, learned counsel pointed out that in terms of Tender Condition No. 7(i) for satisfactory proof of its manufacturing and marketing experience, it was required on the part of respondent no.4 to show satisfactorily that three years before the date of opening of Tender, i.e., 27-4-1998, it had minimum three years experience of manufacturing and marketing the quote product, i.e. Malathion 25% WDP of ISI mark. It is pointed out that in the data furnished in Chart, no experience of manufacturing and marketing the quote product has been claimed. The first batch of manufacture is shown as 8-8-1997 of 500 kg., but, it is not sold to anyone, meaning that there was no marketing experience in the year 1997.

#. In the second column of the Chart, for the years 1998-99 manufactured quantity is shown to be 280 kg. and sale is shown to the extent of same quantity. On behalf of the appellants, learned counsel has produced documents to show that this claim of manufacture and marketing experience by respondent no.4 of 500 kg. in 1997 and 280 kg. in 1998-99 is nothing but a falsity and a concoction. From the license issued by Bureau of Indian Standards dated 9-12-1997 (pp 47 of the Paper Book), it is pointed out that license for ISI was valid to the industry of respondent no.4 from 7-1-1998 to 6-1-1999. Clearly, therefore, prior to 7-1-1998, respondent no.4 can have no manufacturing and marketing experience of ISI mark Malathion. The information supplied for the year 1997 and 1998-99 is not authentic. Although the ISI mark was valid from 7-1-1998, the quantity of 280 kg. of the quote product manufactured in 1998-99 was not in fact marketed or sold, as is claimed, because, the purchase of the product is reserved to the Government and there is no open sale of the product in the market. The claim of respondent no.4 for manufacture and marketing experience in August 1997 and 1998-99 is sought to be demolished by producing on record of the case the proceedings of the Central Purchase Committee, Lucknow dated 31-3-2001 (Annexure E at pp 52 of the Paper Book). The minutes of

those proceedings of the Purchase Committee, Lucknow show that along with other concerns, the respondent no.4's concerns' Tender was not accepted in the proceedings of meeting held on 31-3-2001 only on the ground that respondent no.4 did not possess minimum two years experience of manufacturing and marketing of the quote product, Malathion.

##. Shri Mihir Joshi, learned counsel appearing for respondent no.4 made very strenuous effort to get out of the difficult situation in which respondent no.4 is placed, because of the above information and documents shown on the lack of qualification of three years manufacturing and marketing experience of quote product of his clients. The submission made on behalf of respondent no.4 by the learned counsel is that the experience of manufacturing and marketing was not required in quote product of ISI mark. Requisite experience in manufacturing and marketing of quote product without ISI product was sufficient to make the parties eligible for submission of Tender. Much emphasis has been laid on the heading of the document inviting Tender quoted above. In bold letters, what is emphasised is that down below the quotation as against the heading `Item', the product shown is ` Malathion 25% WDP' with no mention of ISI mark.

##. We have considered the above submission and in our view the Tender document has not to be read by only reading one part contained in the heading of the Tender document. The Tender document has to be read wholly in its various parts including the conditions to ascertain what was the product required and what was the essential qualifications laid down regarding manufacturing and marketing experience. It is not disputed that respondent no.2 intended to purchase Malathion 25% WDP with ISI mark. The only question to be considered is whether the experience in marketing and manufacturing required was of the product with ISI mark or even without ISI mark. In this respect, there is on record the advertisement published in newspaper on behalf of the respondents nos. 1 and 2, which is at page 141 of the Compilation. It is described as a Tender Notice issued by the Government of Gujarat in the Central Medical Stores Organisation. So far as the present Tender Enquiry Number is concerned, it is in block letters and the Tender is invited with the following description:-

"SR.NO.[III] TENDER ENQUIRY NO:
CMSO/D-305/QUANTITY-CONTRACT/200-01
ITEMS:- MALATHION 25% WDP WITH ISI MARK FOR

PURCHASE OF 950 MTS. ON QTY. CONTRACT BASIS."

##. From this Tender Notice published in the newspapers, it is very clear that the product required was with ISI mark. In the various prescribed forms required to be filled by the tenderer, the form of affidavit is also relevant, which in the relevant part requires that `M/s. ..... have manufactured so and paid Sales Tax on the said sales of their product as below:-'. The prescribed affidavit of proof of manufacturing and marketing data also requires information for product manufactured, sold and paid Sales Tax thereon. It also makes it clear that since product can be sold only to the Government with ISI mark, experience in manufacture and sale of ISI mark product is necessary. In Schedule I attached to the Tender document described in detail are the quantity and specifications of the quote product. This also gives the `Enquiry Item No.' and describes the item with specification as `Malathion 25% WDP with ISI mark'. The tenderer also required to submit a valid ISI registration of Bureau of Indian Standards. The entire claim of respondent no.4 of manufacturing and marketing experience in August 1997 and years 1998-99 is demonstrably falsified by their own letter dated 3-7-2000 addressed to Deputy Director, National Anti Malaria Programme, New Delhi (page 130 of the Compilation). Relevant part of the aforesaid letter reads as under:-

"4.Our Plant came into production in January, 1996 while Malathion (Tech.) manufacturing also started only last year out of which we have also exported our malathion (Tech.) to Europe. Malathion 25% WDP is manufactured only against specific Government order against Anti Malaria Programme organised by your Organisation along with State Government. Since, we got Malathion 25% WDP order for the first time in the State of Gujarat, started producing Malathion 25% WDP for the first time in 1999-2000. The total production during the last year has been 1375 M/Tonnes out of which 1373 M/Tonnes was supplied to Government of Gujarat as per photocopy of the orders placed enclosed. We have also received a Certificate of Performance from Government of Gujarat which is also annexed herewith."

##. Having been, thus, exposed in their false claim, on behalf of respondent no.4, an attempt is sought to be made to explain the above contents of the letter that the mention of production for the first time in 1999-2000 is factually incorrect and it refers to manufacturing

undertaken for supply to the State of Gujarat and not generally. By the above stand, what is being sought to be impressed upon us is that apart from the State of Gujarat, there could have been sale to other parties, as per the information supplied in the Chart of sale of 280 kg. in the year 1998-99. To substantiate their marketing experience, as claimed in the Chart, of 280 kg. in the year 1998-99, in SCA 4957/01 at page 67, a document of sale of 280 kg. of Malathion is shown by respondent no.4 Company to Chemicides India Limited on 16-3-1999. The aforesaid claim of sale is prima facie demonstrated to be a fictitious sale by respondent no.4 to a favoured buyer. It is not disputed that the purchase of the product is controlled by the Government and it is not saleable in open market. In the sale document produced by respondent no.4 also it is mentioned `(for Govt. Supply)' and the order is placed telephonically. An affidavit-in-sur-rejoinder was filed by the present appellants in SCA 4957/01 to state that Chemicides India Limited, Alwar, to which 280 kg of quantity of Malathion alleged to have been sold on 16-3-199, is a sister concern, of which Nitin Agarwal, son of Managing Director of respondent No.4 and Mrs. Ajay Agarwal, daughter-in-law of the Managing Director of the petitioners are directors. Naturally, only in order to somehow support their claim of marketing experience of quote product in the year 1999, a bogus transaction has been shown in the document at page 67 of SCA 4957/01. Such a favoured sale to a private party of the quote product reserved for purchase by Government cannot be relied and which has been subsequently brought on record during the pendency of the case before the learned Single Judge by way of a separate Petition, SCA 4957/01. Obviously, it is an after thought and an attempt somehow to support the claim of marketing experience for the product in the year 1998-99. The appellants had thus satisfactorily demonstrated to this Court that respondent no.4 lacked in manufacturing and marketing experience in quoted product with ISI mark for the three preceding years, as prescribed in the tender documents, and it was disqualified form submitting the tender and its acceptance by the Purchase committee. The above disqualification of the respondent no.4 was duly intimated by letter of the appellant dated 14-5-2001 (page 43 - Annexure B) and instead of considering the same to disqualify respondent no.4, a threatening letter in reply was sent by the Director, Central Medical Stores Organisation, Gujarat State (page 49 - Annexure C). Thus, respondent no.4, despite disqualification attached to his Tender was awarded contract for purchase of 70% of the quantity required, which was clearly a favour shown

to respondent no.4.

A VALID SALES TAX CLEARANCE CERTIFICATE

##. One of the Tender Conditions No.8 of the Tender document in its relevant part requires that the Tender must accompany in the prescribed form Sales Tax Clearance Certificate, which must be valid on the date of opening of Tender, i.e., 27-4-2001. In relevant part of the Tender document the accompaniments with the Tender Form to be submitted require submission of `Sales Tax Clearance Certificate for the last year or Returns of last four quarters'. Condition no. 8 quoted above, therefore, required Sales Tax Certificate in the prescribed form should be obtained under the Sales Tax laws and must be shown to be valid on the date of opening of the Tender.

##. On behalf of the appellants, it is pointed out that the Tax Clearance Certificate, submitted by respondent no.4, copy of which in Form S.T. 19 filed at page 80, does not show that a valid Sales Tax Clearance Certificate existed in favour of respondent no.4 on the date of opening of Tender dated 27-4-2001. The relevant part of the Sales Tax Clearance Certificate filed by respondent no.4 is as under:-

"FORM ST 19
TAX CLEARANCE CERTIFICATE

This is to certify that M/s. H.P.M. Ind. Ltd. having RST No. 0205/00696 and CST No. 02057 696 2001 M 95.

(a) has no tax liability outstanding, or has outstanding tax liability amounting to Rs. ..... which has been stayed by ..... upto ..... or is payable through instalments by ..... (date), and

(b) has paid current tax upto the month of January 2000.

sd/-
ASSISTANT COMMISSIONER/
COMMERCIAL TAXES OFFICER
ASSESSING AUTHORITY
CIRCLE ...../WARD.....
SEAL
DATED : 23-02-2000"

##. What is to be noted from the above Certificate submitted is that in clause (a) the blanks are not filled. In clause (b) the Certificate states `has paid current tax upto the month of January 2000'. There is no separate column filled and certified to show what was the validity period of the Certificate, which in fact, is the prescribed part of Form S.T. 19. One of such copy of current Form submitted by respondent no.4 at page 119 of the Compilation filed by them showing the sales tax validity upto 13-6-2001 is reproduced hereinbelow for comparison:-

"This Certificate is valid up to 13/6/01."

##. From the Tax Clearance Certificate actually submitted with the Tender Form by the respondent no.4, the validity period of the Certificate is not to be found. Thus, the Tax Clearance Certificate submitted was not in the prescribed Form S.T. 19 and did not satisfy the requirement of Tax Clearance upto the date of opening of Tender on 27-4-2001. This was one additional reason which the Purchase Committee ought to have considered in not awarding the contract to respondent no.4. On behalf of respondent no.4, learned counsel made strenuous effort to meet the above situation by stating that the relevant part of the condition is not mandatory and if subsequently the Authority had the satisfaction that there were no sales tax dues against the respondent no.4, there was no impediment in accepting his lowest rate quoted. In reply affidavit, it has been stated that all sales tax dues were cleared subsequently for which a Tax Clearance Certificate subsequently obtained on 1-6-2001 has been filed in prescribed Form S.T. at page 119. On this aspect, reliance was placed on behalf of the appellant also on a letter of Rajasthan Sales Tax Authorities dated 15-5-2001 at page 54 of the compilation showing that there were sales tax arrears against respondent no.4. This letter was stated to be procured by the petitioner and was an invited communication to bidders. We need not rely on the said letter of Rajasthan Sales Tax Authorities, as in our opinion, it is clearly demonstrated that the Sales Tax Clearance Certificate submitted with the Tender by respondent no.4 was clearly not in the prescribed form, as it did not show the validity of the Certificate of Tax Clearance upto the date of opening of the Tender i.e. 27-4-2001. Whether this part of requirement of submission of Sales Tax Clearance Certificate could be insisted upon or not is a question which we shall deal later on.

UNSATISFACTORY PAST PERFORMANCE OF THE TENDERER

##. One of the Tender Conditions for acceptance of tender states :

"The tender is liable for rejection due to any of the reasons mentioned below:

1 to 7 xx xx xx

8. Non-submission of required documents as shown in para 12 above.

9. xx xx xx

10. Unsatisfactory past performance of the tenderer.

11 and 12 xx xx"

##. On behalf of the appellants it is stated that the past performance of respondent no.4 in the matter of quote product was unsatisfactory. Reference is made to letter dated 8-11-2000 of the Commissioner of Health and Medical Education addressed to the Director, respondent no.2 herein, in which it is complained that the supply of Malathion by respondent no.4 was irregular and delayed, which affected the Anti Malaria Programme. The above letter on unsatisfactory performance of respondent no.4 is criticised only on the ground that it being an inter-departmental communication between two Officers, the appellants could not have the custody of the same and it is not authentic. It is also submitted that this court should not lend assistance to a party, in exercise of discretionary powers under Article 226, which collects and manages to obtain confidential documents of Government and other Departments and such practice should not be encouraged and the relief claimed should be denied. To support the above ground urged, the respondent produced Certificate of its satisfactory performance issued on 17/20-12-1999. The said Certificate is said to have been issued by Lt. Col. Dr. A.R. Setalwad, Director of Central Medical Stores Organisation. To meet the above objection on poor performance of respondent no.4, letter dated 18-4-2001 containing Certificate of satisfactory performance with no complaints on supplies has been produced, which is in Gujarati. According to the appellants, the above letter is a fake one, as it does not contain the Signature of the Deputy Director, who is shown to be the author of the letter. There is no outward number mentioned as is shown to be found in official letters. The Certificate dated 17/20-12-1999 (page 102 of the Compilation) is, therefore, of general nature and not concerning the performance prior to the date of opening of Tender on 27-4-2001 and is not sufficient to demonstrate satisfactory performance of respondent no.4. We need not

go into details on this aspect, as in our opinion, the submissions in the other two Petitions, under the headings "Lack of Requisite Experience in Manufacturing and Marketing" and "Non-Production of Sales Tax Clearance Certificate" are sufficient to consider the question of alleged disqualification of respondent no. 4.

##. To support the award of 70% of the required quantity to respondent no.4, learned counsel Shri Mihir Joshi took us through the relevant parts of the Special Conditions of the Tender documents and tried to make comparison of language of various conditions and clauses therein. It is submitted that whereever the condition laid down is intended to be mandatory, the result of non-compliance is stated to be rejection of the Tender and the language is in mandatory form, whereas on the requirement such as requisite years of experience of manufacturing and marketing, validity of sales tax clearance certificate and satisfactory past performance, the language in the relevant condition is that for non-fulfilment of the said conditions, `the Tender is liable to be rejected'. It is submitted that the language "liable to be rejected" leaves a discretion and elbow room to the concerned authorities to reject a tender on non-fulfilment of such conditions or to relax them, treating them as non-essential part of the conditions. In this regard, reliance is placed on M/s. Poddar Steel Corporation v. M/s. Ganesh Engineering Works and others AIR 1991 SC 1579, M/s. Saraogi Industrial Corporation and another v. Steel Authority of India Limited and others AIR 1996 Calcutta 325, M/s. Kirloskar Brothers Ltd. v. State of Tripura AIR 2000 Gauhati 143. It is further submitted that since the award of Government contract also involves element of public interest, merely on non-fulfilment of nonessential conditions of Tender, Court should not interfere in exercise of its limited power of judicial review of such administrative action. Reliance is placed on Raunaq International Ltd. v. I.V.R. Construction Ltd. AIR 1999 SC 393.

##. The scope of interference of the Court in matters of public contracts is to a large extent delineated by series of decisions of the Supreme Court staring with leading case Ramana Dayaram Shetty v. International Airport Authority of India and Others (1979) 3 SCC 489. In the case of Tata Cellular v. Union of India (1994) 6 SCC 651, the Court applied the Wednesbury principle of unreasonableness in judging fairness of the administrative decision of public authority in awarding contracts for public work. The Wednesbury principle as laid down in Associated Provincial Picture Houses Ltd.

v. Wednesbury Corporation (1947) 2 All ER 680 Kings Bench and followed in Tata Cellular (supra) by the Supreme Court is "that a decision would be regarded as unreasonable, if it is partial and unequal in its operation as between different classes." The limited scope of judicial review by the Court is that "a decision of public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings, where the court concludes that a decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it". Reliance may also be placed on recent decision of the Supreme Court in Air India Limited v. Cochin International Airport Limited JT 2000 (1) SC 481. Relying on a previous decision of the Supreme court in the case of Tata Cellular (supra) it was held:-

"Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere it it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

##. Applying the above test by the Supreme Court, which lays down the scope of judicial review in matters of awarding public contracts, we have to find out whether in the instant case the action of the Purchase Committee can be said to be fair and reasonable. As has been pointed out, before opening of Commercial Bid and at the time of opening of Technical Bid, the appellants have by their letter informed the concerned authorities the lack of requisite experience in manufacturing and marketing of respondent no.4. Instead of considering that information of his alleged lack of experience, the Authorities threatened the appellants with police action for obtaining confidential information. Whether the confidential information was legitimately obtained by the appellants or not is a separate question and they may be

suitably dealt with on that score. But, a relevant information was given to the concerned Authorities and the Purchase Committee regarding the lack of qualification of experience of respondent no.4. The Purchase Committee could not have overlooked the same. Whether the requirement of requisite experience of manufacture and marketing is mandatory or only directory and whether it should necessarily result in rejection of the Tender is not a question which need to be decided. What is clear to us is that when the issue of lack of requisite experience of manufacture and marketing was placed before the Purchase Committee, they ought to have addressed themselves to the said question. It may also be mentioned that although inclusive of concessional rate of sales tax, the rate quoted by respondent no. 4 was lowest, but, excluding higher rate of sales tax of 4% payable by the appellants, being in a non-concessional zone, the price quoted by the appellants of the base product was lower to the price quoted by respondent no.4 and they had shown their willingness to supply the product at the rate quoted by respondent no.4 inclusive of concessional rate of sales tax payable by them. The Purchase Committee has also in its proceedings considered the two appellants qualified and accepted their offer for supply by awarding contract in their favour of 15% each of the total quantity. Before the Purchase Committee, thus, the contenders were the two appellants, who had quoted the lowest rates for the base product with 4% Central Sales Tax generally leviable and as against them, was the higher rate quoted by respondent no.4 for the base product with 1.15% CST, its industry being in concessional area. Had the Purchase Committee given due regard to the letter sent by the appellants on the aspect of lack of requisite three years experience of manufacturing and marketing of the quote product by respondent no.4, they would have surely excluded respondent no.4 from the contest and the contract for the entire quantity should have been awarded in equal proportion between the two tenderers. What is surprising is that the minutes of the Purchase Committee were not disclosed to Court in due time either before the learned Single Judge or before us in this Letters Patent Appeal. In the course of reply on behalf of respondents nos. 1 and 2, learned AGP for the Government placed a photo copy of the minutes of the Purchase Committee proceedings before us. Its production was rightly objected on behalf of the appellants at that stage of the case. We have, however, looked into the contents of the minutes of the Purchase Committee and we do not find that any consideration was bestowed to the claim made by respondent no.4 on the question of his requisite

experience. It would have been a different case if the Purchase Committee had considered the objections to the claim on requisite experience of respondent no.4 and taken a decision in favour of respondent no.4 either to accept his claim or to waive the said condition treating the same to be a mandatory one. The relevant aspect of the matter between the keen contestants on the question of marketing and manufacturing experience has totally been disregarded. When there is a keen contest for award of contract, it is necessary for the Purchase Committee to make a comparative assessment of the claims of different tenderers and scrutinise their claims on the basis of various data and information supplied in the prescribed form. It has also been demonstrated before us that not only that the respondent no.4 lacked requisite experience of three years, but it has not produced even valid Sales Tax Clearance Certificate. There was complaint regarding its past performance. In these circumstances, it was not expected of respondents nos. 1 and 2 to support the award of the contract to the extent of 70% to respondent no.4 in comparison to only 15% each to the two appellants, who were not disqualified on any factor and in fact had to their credit satisfactory performance of supply of similar product to the Government. Here the Purchase Committee deliberately overlooks the relevant aspects regarding information and data supplied in the Tender form and awards the lion's share of the required quantity to a party which is nowhere in merit, and is disqualified. It has, therefore, to be held that the decision of the Purchase Committee, if not arbitrary, is partial and unfair. It is only a matter of guess and cannot be ascertained from even the minutes produced at the late stage as to what weighed with the Purchase Committee to apportion the quantity required for purchase unequally, 70% to respondent no.4 and only 15% each to the two appellants. This unequal apportionment of quantity for awarding the contract also does not appeal to the sense of fair play and reasonableness. This, therefore, gives some scope for us, to intervene and hold that the decision making process in awarding public contract by the Purchase Committee is vitiated by unfairness and partiality.

##. Shri Mihir Joshi, learned counsel for respondent no.4 and Mrs. Manisha Lavkumar, learned AGP appearing for the State and its Authorities made strenuous effort to support the decision of the Purchase Committee. At the fag end of the hearing in the course of reply on behalf of the State, Mrs. Manisha Lavkumar placed before us without any affidavit a copy of the proceedings of the Purchase Committee dated 22-5-2001. Strong objection was

taken on behalf of the appellants that the proceedings of the Tender Committee now submitted should not be allowed to be produced, as it would require reopening of the case and filing of additional pleadings and affidavits. Since the proceedings of the Tender Committee were not originally filed, we do not grant any further opportunity to the State to support the action of the Purchase Committee by filing additional affidavit. We have, however, perused the proceedings of the Purchase Committee dated 22-5-2001. On behalf of the State a very hyper-technical objection is taken that in the prayer clause of the Petitions filed by the appellants before the learned Single Judge, no specific prayer was made for quashing the decision of the Purchase Committee. It is submitted that in the absence of such prayer such relief cannot be granted. The proceedings of the Purchase Committee were not disclosed before the learned Single Judge. The Petition was filed before acceptance of the Commercial Bid and the proposed award of contract to respondent no.4 was sought to be intercepted. At that time the prayer clause was worded accordingly. By the time the matter was heard by the learned Single Judge, final award of the contract in proportion of 70% to respondent no.4 and 15% each to the two appellants had already been made. In such a situation, merely because there is no amendment in the prayer clause, the prayer made for setting aside the decision of the Purchase Committee cannot be refused. Parties arraigned before the learned Single Judge and in this Court have fully addressed us on the question of contract in the proportion indicated above.

##. After the decision of the learned Single Judge and filing of the Letters Patent Appeal by the appellants, two separate Special Civil Applications, as aforesaid, have been filed against the two appellants by respondent no.4, challenging the award of 15% of total quantity to each of the two appellants. From the reply affidavits filed before the learned Single Judge in the two Petitions, giving rise to these two Letters Patent Appeals, it is clear that all grounds urged challenging the eligibility and qualification of the appellants were urged before the learned Single Judge as respondent.

##. On behalf of the appellants, a plea of constructive res judicata based on principles contained in Section 11, Explanation IV of Code of Civil Procedure has been raised and reliance is placed on decisions of Supreme Court in the case of Forward Construction Co. v. Prabhat Mandal, Andheri and others and two other parties (1986) 1 SCC 100.

##. We do not consider it necessary to go into the question of operation of principle of constructive res judicata, as respondents before the learned Single Judge, raised all the pleas challenging the award of contract to the extent of 15% of total quantity each to the appellants. By filling separate Writ Petitions, prayer is made for setting aside the award of contract in that quantity to the two appellants. The filing of separate Writ Petitions is obviously an after thought and a counterblast to the grounds urged by the appellants against the award of contract for 70% to the respondent no.4.

##. In the counter Petitions, on the qualification of the appellants, it is stated that their claim of manufacturing and marketing experience in the past three years of the opening of tender is unsubstantiated on affidavit. On behalf of the appellants, it is stated that they have started manufacturing and marketing the quote product and had dealings with Government since 1982. Its first batch of product was manufactured on 24-7-1982 and subsequently it had manufactured and marketed the quote product for atleast 8 years prior to the date of opening of the Tender. This statement on affidavit made by the appellants in the counter Petitions has not been demonstrated to be false. It has also not been controverted by the State Authorities. It is also not seriously disputed that in the earlier years the appellants were the main suppliers to the Government of the quoted product and it is only the respondent no.4 which can be called a somewhat new entrant. In support of their marketing and manufacturing experience continuously in the past three years, 1997-98, 1999-2000 and 2000-2001, a Certificate issued by Additional Director (U.P.) Lucknow has been filed and the authenticity of the same is not questioned. In the counter Petition, therefore, the respondent no.4 has thus made a lame attempt to challenge the manufacturing and marketing experience for the requisite years of the appellants.

##. The other ground urged in the counter Petitions is that when the rate quoted by respondent no.4 inclusive of CST was lowest, there was no justification for the Purchase Committee to award even 15% each to the two appellants. So far as this aspect of the matter is concerned, we shall be dealing with it in the subsequent paragraphs, but, it may be stated that ignoring the lack of qualification for manufacturing and marketing of respondent no.4, 70% of the quantity was awarded to it

and on the same lowest rate quoted, the remaining 30% quantity in the ratio of 15% each was awarded to the two appellants. This apportionment clearly appears to us to be unfair as the evidence about the disqualification earned by respondent no.4 was overlooked by the Purchase Committee, although the same was specifically pointed out in time by the appellants to respondents nos. 1 and 2 before the opening of the Commercial Bids which were opened on 14-5-2001.

##. So far as the public element involved in the award of the contract for a product which is required for National Malaria Eradication Programme is concerned, it has been reported to us that as against the 70% (450 M.T.) contract awarded to respondent no.4, which the learned Single Judge permitted the respondent no. 4 to supply to meet the demands of the Government Departments during the monsoon season and in malaria epidemic, all the quantity supplied and so far obtained is only from respondent no.4 and no supply orders as against 15% of quantity awarded to each of the two appellants has been obtained. In the course of hearing of these Appeals and the connected Writ Petitions, it was pointed out that only to take advantage of the entire relief granted by learned Single Judge, last moment hurried attempts are being made to effect the remaining supply. When we had concluded the arguments and reserved the judgment for pronouncement, we had to pass an interim order of stay so that our order does not remain only a paper order and some injustice is allowed to be undone. On behalf of State now an affidavit has been filed that as against the permitted quantity of 450 M.T. granted by the learned Single Judge after pronouncement of judgment by him, quantity which was already dispatched to Kutch has not been received by the Authorities to obey the status quo order passed by this Court on 7-8-2001.

##. The last point that remains to be considered is as to what relief on the basis of our conclusions need be granted to the appellants. As we have held above, the rate quoted for base product by the appellants was lower than that of respondent no.4 and only because of 1.15% CST, its total price quoted was somewhat lower than what is quoted by the appellants, but the appellants agreed to supply the quote product at the same rate as is quoted by respondent no.4.

##. As we have found above that on the disqualification on requisite experience of manufacturing and marketing and non-production of valid Sales Tax Clearance Certificate coupled with bad past performance, the

respondent no. 4 could have been eliminated by the Purchase Committee, but, the alleged disqualification was not at all looked into. The period of supply limited is only upto 31st August 2001. Monsoon is the malaria epidemic season in which the quote product is urgently required for spray in the State. We, therefore, do not think it proper to send back the matter to the Purchase Committee for reconsideration and fresh award of contract. As against 70% of quantity awarded to respondent no. 4, some supplies have already been made. No supplies have been obtained from the two appellants. To undo the injustice and to set right the action of the Authorities, it would be in the fitness of things now to direct the respondents nos. 1 and 2 to place order and obtain supplies for the remaining required quantity of the quote product from the two appellants in equal proportions. This will take care of the public element and need involved in such public contract. Any further delay would harm the public interest and therefore, in the aforesaid extraordinary circumstances, this relief is required to be granted to the appellants.

##. In the result, the two connected Special Civil Applications Nos. 4956 and 4957 of 2001 are hereby dismissed. Rule is discharged in both the writ petitions.

Both the Letters Patent Appeals are allowed. The common judgment and order of the learned Single Judge dated 2-7-2001 passed in Special Civil Applications Nos. 6886 and 6887 of 2001 is hereby set aside. The award of supply of 70% of the quantity of quote product to respondent no.4 is set aside. The appellants are granted relief by directing the respondents nos. 1 and 2 to obtain the remaining supply of the quote product from the two appellants in equal proportion.

In the circumstances, we make no order as to costs.

(D.M. DHARMADHIKARI, C.J.)

(K.R. VYAS, J)

After pronouncement of the judgment, learned counsel Mr. Mihir Joshi appearing for respondent no.4 and Ms. Manisha Lavkumar appearing for respondents nos. 1 to 3 made a request for stay of our order for a period of four weeks to enable them to prefer Appeal. Since the quote product is required for Malaria Eradication Programme, instead of sending the matter back to the

Purchase Committee, we have directed the respondents to obtain supply in equal proportion from the two appellants. In view of the above direction, it would not be proper to pass any interim orders. Prayer made is, therefore, rejected.

(D.M. DHARMADHIKARI, C.J.)

(K.R. VYAS, J)

[sndevu]